MOTION FILED
JUL 16 1980

No. 79-1612

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

AMERICAN BROADCASTING
COMPANIES, INC., et al.,
Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC.,
VEGOD CORPORATION,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND BRIEF OF AMICUS CURIAE

KATHLEEN E. DOYLE
1020 N Street, Rm. A-602
Sacramento, CA 95814
(916) 445-5126

Attorney for Richard B. Spohn, Director of the Department of Consumer Affairs of the State of California

RICHARD A. ELBRECHT
A. PAUL GRIEBEL
ROGER E. DICKINSON
LAURA W. KAPLAN
DOROTHY M. JONES
Department of Consumer Affairs
Division of Consumer Services
Legal Services Unit, Rm. A-602
1020 N Street
Sacramento, CA 95814
(916) 445-5126

Of Counsel

QUESTIONS PRESENTED

1. Whether the decision of the California Supreme Court in Vegod Corporation, et al. v. American Broadcasting Companies, Inc., et al., 25 Cal.3d 763 (1979) is in accord with applicable United States Supreme Court decisions. The court first denied protection of the actual malice test to consumer protective criticism and reporting as a category of speech, and then included this consideration in its balancing process to determine whether or not a libel plaintiff was a public figure.

2. Whether a business entity which has widely advertised its wares in the marketplace to the public is a public figure for the limited purpose of consumer advocacy, criticism and reporting.

INDEX

	Page
QUESTIONS PRESENTED	i
MOTION TO FILE BRIEF AS AMICUS CURIAE	iv
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. INTEREST OF AMICUS	3
II. THE CALIFORNIA DECISION IS NOT IN ACCORD WITH DECISIONS OF THIS COURT INSOFAR AS IT FIRST DETERMINED THAT MEDIA REPORTING OF A CONSUMER ADVOCATES' CRITICISM OF BUSINESS PRACTICES IS CATEGORICALLY NOT ENTITLED TO THE PROTECTION OF THE ACTUAL MALICE TEST AND THEN CONSIDERED THIS FACTOR IN ITS BALANCING PROCESS TO DETERMINE WHETHER THE STANDARD WOULD APPLY . . .	3
III. IN CONDUCTING ITS BUSINESS IN THE WELL-KNOWN NAME OF THE CITY OF PARIS, AND IN OFFERING ITS WARES IN THE MARKETPLACE VEGOD CORPORATION VOLUNTARILY ENTERED THE PUBLIC ARENA AND BECAME A PUBLIC FIGURE FOR THE LIMITED PURPOSE OF CONSUMER PROTECTIVE CRITICISM OF ITS BUSINESS PRACTICES	9
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: Page

Central Hudson Gas and Electric Company v. Public Service Commission of New York 48 L.W. 4783 (1980) 5,6,15

Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974) 7,9,10

New York Times v. Sullivan 376 U.S. 254 (1964) iv,6,9

Steaks Unlimited, Inc. v. Donna Deaner and WTAE-TV 4 and Hearst Corporation C.A.No. 77-0803, 3rd Cir., April 24, 1980 12

Time, Inc. v. Firestone 424 U.S. 449 (1976) 8

Virginia Board of Pharmacy v. Virginia Citizens Consumers Council, Inc. 425 U.S. 748 (1976) 5,8

Constitution:

United State Constitution: First Amendment 7,8

Statutes:

Business and Professions Code §320 . . iv

MOTION TO FILE BRIEF AS AMICUS CURIAE

Richard B. Spohn, Director of the California Department of Consumer Affairs, respectfully moves for leave to file the attached Brief Amicus Curiae in this case, pursuant to Rule 42. The interest of the California Department of Consumer Affairs arises from the fact that it is the state agency mandated to protect and advance the interests of the citizens of the State of California as consumers. See California Business and Professions Code Section 320. The California Supreme Court has ruled in Vegod Corporation, et al. v. American Broadcasting Company Inc., 25 Cal.3d 763, (1979) that criticism of business practices is not entitled to the protection of the actual malice standard set by this court in New York Times v. Sullivan 376 U.S. 254 (1964). The standard was designed to prevent chilling of speech and self censorship by the press due to the threat of libel litigation. The California Supreme Court has definitively

determined that criticism of business practices does not require or merit the protection of this higher standard of proof.

The California Supreme Court also has ruled that a business entity which has made substantial use of the media to advertise a sale in the name of a well known department store and which had clearly thrust its activities into the public arena in the marketplace of goods and services is not a public figure for the purpose of a defamation action arising out of consumer protective criticism of the business practices in the sale. The libel action arose out of the reporting of this criticism to the public. Such media reporting presents the only way in which the consuming public can receive information other than those statements made by the business in media advertising campaigns such as the one conducted for the City of Paris' sale. Information about the marketplace and the actors in the marketplace from other than those who are advertising their wares and acting in economic self interest is critical to the

consuming public as well as to the proper functioning of our economy. Consumers must have such information in order to make informed decisions. The result of the holding of the California Supreme Court can only be a chilling of that form of speech known as consumer advocacy and reporting.

Since fearless consumer reporting and criticism is a major element of any program to inform and protect consumers from dangerous products and unlawful business practices, the interests of California's consumers, whose interests Amicus Curiae is mandated to protect, are clearly adversely affected by the ruling of the California Supreme Court.

Because Amicus Curiae is specifically mandated to represent the consumer interest, it is believed that the brief which Amicus Curiae is requesting permission to file will contain a more complete argument on the question of the need for the actual malice standard in order to prevent the

chilling of consumer reporting and consumer criticism of business practices.

DATED: July 10, 1980.

Respectfully submitted,

Kathleen E. Doyle

KATHLEEN E. DOYLE
Staff Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1612

AMERICAN BROADCASTING
COMPANIES, INC., et al.
Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC.,
VEGOD CORPORATION,
Respondents.

BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUMMARY OF ARGUMENT

Amicus Curiae supports the Petition for Certiorari filed by American Broadcasting Company and the Better Business Bureau. Amicus argues that consumer advocacy and reporting is a very important form of speech, and that the holding of the California Supreme Court improperly considers the importance of that category of speech, apart from its allegedly libelous content, in determining the applicability of the actual malice standard. In so doing, the California Supreme Court decision is not in accord with the controlling cases of this Court. Amicus also supports Petitioner's assertion that there is a conflict in the decision of the California Court and the Third Circuit Court of Appeals which raises an important federal question.

ARGUMENT

I

INTEREST OF AMICUS

The interest of Amicus is fully set forth in his Motion to file this brief as Amicus Curiae.

II

THE CALIFORNIA DECISION IS NOT IN ACCORD WITH DECISIONS OF THIS COURT INSOFAR AS IT FIRST DETERMINED THAT MEDIA REPORTING OF CONSUMER ADVOCATES' CRITICISM OF BUSINESS PRACTICES IS CATEGORICALLY NOT ENTITLED TO THE PROTECTION OF THE ACTUAL MALICE TEST AND THEN CONSIDERED THIS FACTOR IN ITS BALANCING PROCESS TO DETERMINE WHETHER THE STANDARD WOULD APPLY.

The California Supreme Court has ruled that criticism of business practices is categorically not entitled to the protection of the actual malice test. The Court held in Vegod Corporation, et al. v. American Broadcasting Companies, Inc., et al., supra, as follows at page 770:

> "Criticism of commercial conduct does not deserve the protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (Herbert v. Lando (1979) 60 L.Ed.2d 115, 129), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur."

The first sentence of the Court's ruling is supported by no authority. It is also an improper consideration when a court applies the balancing test to reach the Court's conclusion.

The criticism of the City of Paris sale which formed the basis of the libel complaint of Vegod Corporation represented an effort by a responsible consumer protection agency, the Better Business Bureau, and the American Broadcasting Company, to perform a public service by providing consumers with a source of information other than the media advertisements of Vegod Corporation regarding

the City of Paris sale. The noncommercial communication of such information from third parties such as the Better Business Bureau about products and business practices is crucial for a consuming public which is subject to a barrage of advertising messages communicating a glittering array of proposed commercial transactions.

Consumer advocacy and criticism of business practices which takes the form of an informational service is performed by public-spirited organizations such as the Better Business Bureau and is communicated to the public through the media. Such speech is motivated by a concern that consumers enter the marketplace with as much information as possible. In a different context, the Court has stressed the value of such information both to the individual consumer and to the economy as a whole. See Virginia Board of Pharmacy v. Virginia Citizens Consumer's Council, Inc., 425 U.S. 748 at 764-765 (1976) and Central

Hudson Gas and Electric Company v. Public Service Commission of New York No. 79-565 48 L.W. 4783 (1980). Because the speakers or advocates are not motivated by economic self interest, such speech is not hardy and can be as easily and effectively chilled by the threat of libel litigation as unpopular political speech. The constitutional considerations stemming from concern about self censorship which caused this Court to rule in New York Times v. Sullivan, supra, that the actual malice standard of proof was essential in order to prevent the chilling of unpopular criticism of public officials, apply with equal force to speech which criticizes business practices. Such speech can be easily distinguished from the advertising at issue in such cases as Central Hudson Gas and Electric Company v. Public Service Commission of New York, supra. Consumer advocacy and reporting is not "commercial speech" and is a more than appropriate subject for protection of the actual malice standard.

In any event, the ruling of the California Supreme Court is not in accord with this Court's previous decisions; it includes as a factor in the balancing process between First Amendment interests and reputation interests, its exclusion of consumer protective criticism of business activities and the media reporting of same from the protection of the actual malice test.

The inclusion of such a consideration in making the determination that Vegod was not part of a public controversy or a public figure is not in accord with the decision of this court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In that case, this Court held that the applicability of the actual malice standard turns on the public figure status of the plaintiff. In no case has a wholesale denial of protection to an entire category of fully protected speech played a role in determining whether plaintiff was a public figure.

this Court has specifically refused to consider the content of speech in determining the applicability of the standard. This Court stated in Time, Inc. v. Firestone, 424 U.S. 449 (1976) at 456 as follows:

> "Whatever their general validity, use of such subject matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in the area."

The categorical statement that criticism of business practices does not "deserve" the protection of the actual malice test has no place in the analysis. The California decision, Amicus Curiae submits, is also not in accord with the Court's decisions attaching great importance to communications which inform consumers even when they take the form of commercial speech. Virginia Board of Pharmacy v. Virginia Citizens Consumers Council, Inc., supra.

However, the decision is clearly not in accord with this Court's decisions in which First Amendment interests have been balanced against the interests in reputation. In

weighing in that balance its initial wholesale withdrawal of the entire subject matter of consumer protective criticism and reporting from actual malice protection, the California Court has strayed far from the line of cases beginning with New York Times v. Sullivan, supra.

III

IN CONDUCTING ITS BUSINESS IN THE WELL-KNOWN NAME OF THE CITY OF PARIS, AND IN OFFERING ITS WARES IN THE MARKETPLACE, VEGOD CORPORATION VOLUNTARILY ENTERED THE PUBLIC ARENA AND BECAME A PUBLIC FIGURE FOR THE LIMITED PURPOSE OF CONSUMER PROTECTIVE CRITICISM OF ITS BUSINESS PRACTICES.

In Gertz v. Robert Welch, Inc. supra, this Court defined some general principles to be followed in distinguishing among libel plaintiffs for the purpose of determining to which the actual malice standard of proof would apply. Justice Powell, writing for the Court, first observed that those libel plaintiffs with access to the media, or those who could make use of available opportunities

to correct an error and minimize its adverse impact on reputation, would be more likely to be classified as public figures. The second and more important consideration underlying the distinction between public and private defamation plaintiffs was the fairness of a rule which required those who seek public office or who thrust themselves into the public arena to bear the consequences of the attention and comment which such plaintiffs have inevitably invited by their own conduct. Id. at pages 344-345. As Justice Powell noted at page 345:

> "Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."

The language of the rules defined in Gertz, a case in which the plaintiff was a natural person, more easily lend themselves to application to natural persons than they do to a corporate plaintiff such as Vegod.

Yet when these rules are properly applied it is difficult to avoid the conclusion that Vegod did indeed thrust itself into the public arena through its widely advertised sale and the operation of its business through the well-known City of Paris name. While it may be true that few had heard of Vegod prior to the television broadcast, all had heard of the City of Paris. In doing business with the public through the City of Paris name, Vegod accepted the consequences, both the benefits and the burdens, of selling in the name of a well-known and advertised business entity. Furthermore, even if Vegod Corporation had simply advertised the sale in its own name, having done so, Vegod would have thrust itself into the public arena and the public eye for the limited purpose of criticism of its business activities and products. Certainly, for the limited purpose of consumer criticism and reporting, Vegod voluntarily transmuted its otherwise private character into a public one. Any

business which advertises and places its wares in the open market exposes itself to the risk of a consumer reporter's critique of its practices and wares for the purpose of informing the consuming public.

In Steaks Unlimited, Inc. v. Donna Deaner and WTAE-TV 4 and Hearst Corporation (C.A. No. 77-0803, 3d Cir., April 24, 1980), the Third Circuit Court of Appeals was recently called upon to rule on the public figure status of a business entity in a case with facts remarkably similar to those of the case at bar. The Court determined that through its intensive media campaign, the business plaintiff in that case had invited public attention, comment and criticism. (Slip Op. pages 16 and 17). The Court also considered the fact that Steaks Unlimited, Inc., possessed regular and continuing access to the channels of communication through its normal advertising activities. The

Court held as follows:

> "Accordingly, we hold that the District Court did not err in concluding that Steaks, by reason of its intensive advertising campaign and its continuing access to channels of communication, is a public figure with respect to the controversy surrounding the Deaner report. (Slip Op. at page 18)

The Court ruled that Steaks was a limited purpose public figure for the purpose of consumer criticism, reporting and advocacy. While this court has not had occasion to rule on the question, Amicus Curiae submits that the reasoning of the Third Circuit Court of Appeals results in a proper balance between the interest of a business entity libel plaintiff in its reputation, and the interest of the public in a free press and in access to consumer informational criticism from consumer protection agencies. Such speech is designed to protect consumers from the business practices of those who engage in widespread advertising or in wide dissemination of their product in the marketplace. The

California decision is in conflict with that of a Federal Circuit Court of Appeals. The petition should be granted to resolve this conflict on a very important question of federal law.

CONCLUSION

The California Supreme Court's decision is not in accord with the decisions of this Court as to the factors which may be properly considered in determining whether or not the actual malice standard applies. The California decision is also in conflict with the decision of the Third Circuit Court of Appeals as to an important federal question which affects all consumers. Amicus Curiae respectfully submits that the Petition for Certiorari should be granted. Certainly, in light of the fundamental error in reasoning referred to above, Amicus Curiae respectfully submits that the decision of the California Supreme Court should at least be vacated and the case remanded to permit the California Court to reconsider its decision. Amicus

suggests this particularly in view of this Court's very recent decision in Central Hudson Gas and Electric v. Public Service Commission of New York, supra.

DATED: July 10, 1980.

Respectfully submitted,

KATHLEEN E. DOYLE
Department of Consumer Affairs
Division of Consumer Services
Legal Services Unit, Rm. A-602
1020 N Street
Sacramento, CA 95814
(916) 445-5126